Supreme Court, U.S.
FILED
JAN 11 2011
OFFICE OF THE CLERK

179

(3)

No. 10-131

IN THE

Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; MICHAEL A. GARGANO, in his official capacity as Secretary of the Indiana Family and Social Services Administration; GINA ECKART, in her official capacity as Director of the Division of Mental Health and Addiction; LARRY LISAK, in his official capacity as Superintendent of Larue Carter Memorial Hospital,

Petitioners,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER HAGAN MCVEIGH
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF THE PETITION..... 1

I. The Seventh Circuit Chose to Address Indiana's Sovereign Immunity Claim and it is Therefore a Live Issue 2

II. The Seventh Circuit's Ruling on the Cause of Action Issue is in Tension with Supreme Court Precedent..... 4

III. In Conflict with the Decision Below, Both HHS and a State Supreme Court have Concluded that Confidential Peer Review Documents Are Not Covered by PAIMI..... 8

CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 5

Brunner v. Ohio Republican Party,
555 U.S. 5 (2008) 5

Calderon v. Ashmus,
523 U.S. 740 (1998) 3

Ctr. for Legal Advocacy v. Hammons,
323 F.3d 1262 (10th Cir. 2003) 5

Davis v. Passman,
442 U.S. 228 (1979) 5

Disabilities Rights Ctr., Inc. v. Comm'r, New Hampshire Dep't of Corrections,
732 A.2d 1021 (N.H. 1999) 8

Edelman v. Jordan,
415 U.S. 651 (1974) 3

Florida Dep't of State v. Treasure Salvors, Inc.,
458 U.S. 670 (1982) 3

Ford Motor Co. v. Dep't of Treas. of Ind.,
323 U.S. 459 (1945) 2, 3

CASES (CONT'D)

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 5, 8

Lapides v. Bd. of Regents of the Univ. Sys. of Georgia,
535 U.S. 613 (2002) 3

Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health,
447 F.3d 1021 (8th Cir. 2006) 5

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984) 3

Pennsylvania Prot. & Advocacy, Inc. v. Houstoun,
228 F.3d 423 (3d Cir. 2000) 4, 5

Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.,
448 F.3d 119 (2d Cir. 2006) 4

Sosna v. Iowa,
419 U.S. 393 (1975) 3

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 5

Virginia v. Reinhard,
568 F.3d 110 (4th Cir. 2009) 1

Wisconsin Dep't of Corr. v. Schacht,
524 U.S. 381 (1998) 3

STATUTES

42 U.S.C. § 1983 7

REGULATIONS

42 C.F.R. § 51.41(c)(4) 8

73 Fed. Reg. 19,708 (Apr. 10, 2008) 8

73 Fed. Reg. 19,715 (Apr. 10, 2008) 8

REPLY IN SUPPORT OF THE PETITION

Respondent's suggestion that this case has no continuing importance because the state already disclosed the documents at issue, Brief in Opposition at 14, is plainly wrong and also sadly disingenuous. First, the state officials reserved the right to take back the documents should they prevail here. Petition at 10. Second, IPAS opposed Petitioners' request for a stay because the "tools available to a district court, including the ability to order all copies of the documents in IPAS's possession destroyed, could [ ] substantially cure any injury caused by the disclosure to IPAS." Opp'n to Appellants' Mot. to Stay Mandate at 4. Third, any ruling from the Court on the matters raised here will have ongoing practical significance for the administration of state agencies as well as other targets of IPAS investigations. A decision on the merits of the cause of action and peer review issues will impact Congress and the Department of Health and Human Services as well. Accordingly, this case remains important to several state and federal constituencies, and for that reason should be granted.

What is more, IPAS concedes that this case presents the identical sovereign immunity issue as the Virginia Office of Protection and Advocacy case currently pending before the Court, *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3737 (U.S. June 22, 2010) (No. 09-529) (oral argument heard Dec. 1, 2010). *See* Brief in Opposition at 16 ("This Court is addressing that very

issue in" *Reinhard*). Because the issue is the same, the outcome of *Reinhard* should control the result of the sovereign immunity question presented here. Thus, the Court should at the very least hold this case pending its decision in *Reinhard*.

I. The Seventh Circuit Chose to Address Indiana's Sovereign Immunity Claim and it is Therefore a Live Issue

IPAS's argument that the state has waived its Eleventh Amendment argument is simply wrong. After a request for supplemental briefing by the Seventh Circuit panel, the state raised sovereign immunity issues. *See* State's Supplemental Br. at 4. Further, after the petition for rehearing *en banc* was granted, the parties were ordered to brief the case anew. App. 72a-73a. In the *en banc* briefs—the controlling appellate briefs—the Eleventh Amendment issue was fully engaged by both parties. State En Banc Br. at 13-25; IPAS En Banc Br. at 24-33. And, of course, the *en banc* court below squarely addressed the issue. App. 9a-18a.

The state could have raised its Eleventh Amendment defense for the first time even in this Court: "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co. v. Dep't of Treas. of Ind.*, 323 U.S. 459, 467 (1945), *overruled in part on*

other grounds[1] *by Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613, 623 (2002); *see also Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) ("the failure of the State to raise the defense of sovereign immunity in the District Court would not have barred Iowa from raising that issue in this Court").

More specifically, "[t]he Court has said the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 393-94 (1998) (Kennedy, J. concurring) (citing *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683, n.18 (1982) (plurality opinion); *Calderon v. Ashmus*, 523 U.S. 740, 745, n.2 (1998); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, n.8 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974)).

Regardless, the Seventh Circuit panel raised the sovereign immunity issue, as it was entitled to do, and the *en banc* court correctly found that "because the panel opened the door, [it needed to] address the defense." App. 10a. This effectively negates any suggestion of waiver. The Seventh Circuit decided the issue, the result impairs the state's immunity

---

[1] In *Lapides*, the Court's finding of waiver was "limit[ed] . . . to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." 535 U.S. at 617. This concern does not apply where, as here, there has been no removal of state law claims to federal court.

going forward, and, therefore, the issue is alive and appealable.

IPAS nonetheless claims that the Seventh Circuit should not have addressed the Eleventh Amendment defense in its *en banc* opinion even though the panel based its decision on that issue. Brief in Opposition at 17. If the *en banc* court had ignored the issue, however, there would have been no circuit conflict prompting the Court to grant *certiorari* in *Reinhard*. IPAS's argument, taken to its logical conclusion, implies that the Court should (1) grant, vacate and remand this case with instructions that the Seventh Circuit remove the Eleventh Amendment holding from its *en banc* opinion; and (2) dismiss the VOPA case as improvidently granted in light of a lack of circuit conflict.

It seems unlikely that IPAS would actually desire this result, so its waiver argument cannot be given credence. Accordingly the Court should at the very least hold this case pending resolution of *Reinhard*.

II. The Seventh Circuit's Ruling on the Cause of Action Issue is in Tension with Supreme Court Precedent

IPAS stresses that whether PAIMI creates a cause of action is "an issue of first impression." Brief in Opposition at 19. Yet four other circuits have granted relief to P&A systems as if a PAIMI cause of action exists. *See, e.g., Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006); *Pennsylvania*

Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423, 428 (3d Cir. 2000); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003). None of these cases even cites *Gonzaga* or otherwise explains where they found a PAIMI cause of action, yet they permitted one *sub silentio*. The Court should not wait on the unlikely event that these courts will reverse course before taking up this issue.

The decision below and the tacit approval of a PAIMI cause of action elsewhere is especially troubling because this Court has so emphatically provided clear guidance on when and how Spending Clause statutes create causes of action. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Davis v. Passman*, 442 U.S. 228, 239 (1979). Whether Congress intended to create a cause of action "'is definitively answered in the negative' where 'a statute by its terms grants no private rights to any identifiable class.'" *Gonzaga*, 536 U.S. at 283-84 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). More recently, this Court reemphasized that causes of action must be clearly set forth by Congress, rejecting as it did the Sixth Circuit's understanding that state-level administrative processes can imply rights of action to enforce federal programs. *See Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam).

Here, "[t]he statutes in question do not confer rights on the plaintiff." App. 49a (Easterbrook, C.J.,

dissenting); *see also* Petition at 13-25. The *en banc* court's creation of a cause of action shows that the Court's repeated doctrinal instructions are not being carried out. *See* App. 49a (Easterbrook, C.J., dissenting). Given the nature of the doctrine at stake, which requires clarity on the part of Congress before the Court finds a right of action, and given that so many appeals courts have already assumed this issue away, this is not a case where the Court is likely to gain any benefit from further percolation and insight from lower courts. Either Congress unambiguously provided a cause of action under PAIMI or it did not.

Furthermore, IPAS suggests that it would somehow be unfair for PAIMI to be treated as a typical Spending Clause statute because cancellation of the federal grant would harm IPAS and its particular mission rather than other state officials and their particular mission. Brief in Opposition at 22. But it is the need to hold accountable the grant-receiving state, not a particular agency or official of that state, that makes grant revocation an appropriate remedy. If Indiana loses the grant that funds IPAS, *Indiana* is held accountable, and IPAS's funding is part of that.

Ultimately, like its (and VOPA's) arguments with regard to the sovereign immunity issue, IPAS's position on this "fairness" issue ignores the fact that IPAS *is* the state. Even if a state-agency protection and advocacy system has a sufficiently justiciable stake to satisfy Article III (and some members of the Court raised doubts about this at the oral argument

in *Reinhard*), it is wrong to conceptualize IPAS as having some broader equitable interest in federal funding beyond its role as an appendage of the state.

Regardless, it is irrelevant to the cause of action issue whether judges may think it unfair to defund IPAS in response to the failings of another state agency's officials. The existence of remedies "depend[s] on the statutory text and structure, not on judges' views about how much enforcement, and by whom, is optimal." App. at 49a (Easterbrook, C.J., dissenting).

PAIMI provides no cause of action for this lawsuit. The Court should grant this case to emphasize the restrictions imposed on lower courts by its right-of-action precedents.[2]

---

[2] IPAS suggests that it could also proceed under 42 U.S.C. § 1983. Brief in Opposition at 23 n.4. In the *en banc* proceedings, however, IPAS conceded that, as a state agency, it could not bring suit under Section 1983. It even asked for a remand so as to amend its complaint to add its Executive Director in his official capacity as a plaintiff. *See* IPAS En Banc Br. at 50. IPAS thus recognized that because of its pleading choices, Section 1983 was not the "alternative grounds for affirmance" that it now claims. Brief in Opposition at 23 n.4. Regardless, the IPAS Executive Director is no more a "person" under Section 1983 than is IPAS, as the rationale for allowing Section 1983 suits for injunctive relief to proceed *against* state officials does not apply to such suits *by* state officials—the law of Section 1983 cannot bear any more fictions than it already has. *See* State En Banc Reply Br. at 18. Finally, Section 1983 "merely provides a mechanism for enforcing individual rights 'secured' elsewhere," and if PAIMI does not secure rights justifying a cause of action, *see supra* Part II, any properly raised Section 1983 claim would also fail.

III. In Conflict with the Decision Below, Both HHS and a State Supreme Court have Concluded that Confidential Peer Review Documents Are Not Covered by PAIMI

The Department of Health and Human Services has promulgated a rule interpreting PAIMI to exclude peer review records, the confidentiality of which is otherwise protected by state law. *See* 42 C.F.R. § 51.41(c)(4). Five courts of appeals, including the Seventh Circuit, have now found that the HHS rule is inconsistent with PAIMI. *See* Brief in Opposition at 23-24. The New Hampshire Supreme Court, however, has upheld and enforced HHS's regulation concerning peer review records. *Disabilities Rights Ctr., Inc. v. Comm'r, New Hampshire Dep't of Corrections*, 732 A.2d 1021, 1024 (N.H. 1999).

HHS is in the process of promulgating a new rule, 73 Fed. Reg. 19,708, 19,715, (Apr. 10, 2008), but that process began more than two years ago, and there is no reason to believe that a final revision will be issued soon. The conflict among courts regarding the extant regulation continues to cause confusion for doctors, administrators and agency officials who must try to apply the law. The Court needs to resolve the peer-review documents issue for the sake of consistency and finality.

Gonzaga, 536 U.S. at 285; *see also* State En Banc Reply Br. at 17-19.

CONCLUSION

The petition should be granted or at the very least held pending the Court's decision in *Reinhard*.

Respectfully Submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER HAGAN MCVEIGH
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Petitioner

Dated: January 11, 2011